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Toward a History of the Legalization of American Legal Ethics -- II The Modern Era

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ARTICLES

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INTRODUCTION

Perhaps the most surreal, yet telling, moment in the long process of the adoption of the *Restatement of the Law Governing Lawyers*[1] by the American Law Institute (ALI) occurred in the waning minutes of the 1996 debate before the entire Institute membership.[2] John Frank–partner in an important law firm, thoughtful author, long-time luminary of the bar, sometimes-iconoclastic voice, member of the ALI's governing Council, and a regular contributor to the ongoing debates over the *Restatement* and much else–rose to oppose the entire project.[3] His argument, which failed to derail the *Restatement* project, nonetheless probably well-captured a general concern among large portions of the American bar. He voiced the fear that the *Restatement,* as it had emerged, would only exacerbate the high degree of regulation to which the bar had already fallen victim, leading, he feared, to only more regulation.[4] The lack of support for that

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* Charles Frank Reavis Sr. Professor Emeritus, Cornell Law School. This Article is a revised version of a lecture sponsored by *The Georgetown Journal of Legal Ethics* that was delivered at the Georgetown University Law Center on April 9, 2001. This Article is a sequel to *Toward a History of the Legalization of American Legal Ethics–I. Origins*, 8 U. CHI. L. SCH. ROUNDTABLE 469 (2001).

1. The entire *Restatement* project was provisionally approved at the May 1998 annual meeting, reviewed by an ad hoc group for consistency and to comport with discussion at that and two prior annual meetings, and finally published in a two-volume set in 2000. *See* RESTATEMENT OF THE LAW GOVERNING LAWYERS (2000) [hereinafter RESTATEMENT].

2. In the interest of candor, it should be pointed out that a small minority of the American Law Institute constitutes a quorum at annual meetings, that the quorum rule is based on registration at any time during the four-day meeting (rather than actual attendance at the meeting itself), and that often an even smaller number of members actually attends and votes at meetings. *See* Charles W. Wolfram, *Bismarck's Sausages and the ALI's Restatements*, 26 HOFSTRA L. REV. 817, 832 (1998) (noting minimal quorum and voting rules governing ALI annual meetings).

3. *See Continuation of Discussion of Restatement of the Law Third, The Law Governing Lawyers*, 75 A.L.I. PROC. 438-89 (1996).

4. *Id.* at 439. In the course of his remarks, which bear reading in full, Mr. Frank complained that

> there are 800,000 [sic] lawyers out there that we are regulating in an incredibly minute way on incredible details of their lives. . . . In my view, we are putting an anchor around the necks of the legal profession by imposing this gigantic load upon our fellow members of the bar. . . . And so it is my

position in the ALI membership was probably a function much more of acceptance of the inevitability of lawyer regulation by the voting membership (which, of course, consists entirely of lawyers) than disagreement with Frank's fundamental concern about it.

The early history of American legal ethics gave no indication that lawyers would one day become a highly regulated profession. For the most part, regulation was highly traditional, episodic, and reactive, and was addressed primarily to pathological extremes of lawyer behavior.[5] But, that was then and this is now. We are now at a very different place with respect to lawyer regulation. The point hardly needs to be pressed before an audience whose law student members have spent much of the past one or two academic years of their lives editing and publishing articles written by students, scholars, and practitioners on the legal regulation of lawyers. Lawyers are now regularly sued for legal malpractice with a growing number of theories of liability available against them.[6] Client rights can readily be enforced by invoking increasingly detailed lawyer codes, which are admissible as evidence of the standard to which the lawyer is held.[7] The grounds for discipline have been elaborated upon and extended in lawyer codes that are now explicitly designed for all-encompassing and coercive regulation, rather than for aspirational modeling by well-disposed lawyers who elect to do so.[8] Discipline is now administered in almost every state by an independent agency of the state (typically, an agency of the state's supreme court) and is much less under the influence of lawyers and their bar associations than was true earlier in the twentieth century.[9] Discipline is administered with vigor and consistency through a professional bureaucracy.[10] While the absence of meaningful records precludes the generation of statistics of the extent of lawyer discipline prior to 1970, my distinct impression, in agreement with the bar's self-assessment, is that there was much less regulation compared to today.[11] In

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> profound belief that we are grossly overregulating our profession by the acts which we are doing here, and I regret it. . . .

Mr. Frank might have attributed more influence to a restatement than the facts warrant. Moreover, my own reckoning is that this *Restatement* invented but very little, and was mainly concerned with documenting a legal development that had already taken place or was well underway generally in the United States. At most, the *Restatement's* influence will be incremental.

5. *See* Charles W. Wolfram, *Toward a History of the Legalization of American Legal Ethics–I. Origins*, 8 U. CHI. L. SCH. ROUNDTABLE 469 (2001) [hereinafter Wolfram, *Origins*], which traces the history of legal ethics in the British North American colonies and the United States through the nineteenth century and into the twentieth. For present purposes, that article found little lawyer discipline and other forms of lawyer litigation.

6. *See infra* text accompanying notes 30-37.

7. *See infra* text accompanying note 37.

8. *See infra* text accompanying notes 42-45.

9. *E.g.*, RESTATEMENT, *supra* note 1, at 42-43, at § 96; Charles W. Wolfram, *Barriers to Effective Public Participation in Regulation of the Legal Profession*, 62 MINN. L. REV. 619, 620-21 (1978).

10. Bar counsel, as they are now uniformly termed, are sufficiently numerous and self-confident to have formed, over two decades ago, a National Organization of Bar Counsel.

11. *See infra* text accompanying notes 41-45.

general, lawyers are no longer left largely alone by the disciplinary system, which now deals with lawyer conduct that includes much that is not intolerably unacceptable or public and thus notorious. The significant extent of legal regulation of lawyers currently would be readily accepted by every professional observer of the American legal profession. Aside from an incidental effort to document that proposition, my main task here will, for many such observers, be an even more important inquiry: why was it that lawyers became, rather suddenly, subject to the regulatory state beginning in approximately 1970?

It stretches the point only slightly to say that the practice of law in America is now, as with many other contemporary areas of corporate or personal economic endeavor, a regulated industry. That is true in the sense that much of what a lawyer might choose to do or not do is regulated by legal prescriptions requiring certain action. The breach of such a regulation by the lawyer subjects her to a significant threat of sanctions that both courts and specialized administrative tribunals and agencies are empowered to administer and indeed will and do administer in an energetic way. The regulatory apparatus is both supported by and moved forward through a system of administrative and judicial rulemaking[12] that, although unique to the legal profession with respect to the degree to which lawyers and lawyer-dominated organizations control the process, is nonetheless actively at work in enacting and enforcing more and more regulations of new or old aspects of legal practice.[13] In most states, the disciplinary process is one upon which lawyers, through their bar organizations, exert only mild influence, and they exert very little influence at all with respect to the prosecutorial agenda of the bar-discipline agencies.

Those lawyers of my age (LL.B. 1962), who were paying attention at the time, can all attest that when they graduated from law school, lawyers were subject to nowhere near the same degree of legal regulation. The threat of professional discipline was virtually non-existent, as long as the lawyer did not commit a felony or a similarly egregious offense. The threat of legal malpractice recovery or of a remedy such as disqualification for a conflict of interest was almost as equally remote. Today, however, we now need the *Restatement*, or at least have more frequent occasion to put it to use in order to help keep track of the extensive

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12. I refer here to the work of the ABA House of Delegates and the rule-framing committees which recommends professional rules and amendments to them as well as the more fundamental work of local bar groups and, typically, state supreme courts in adopting versions of the ABA rules that are, at a minimum, modified to fit local preferences. In a few states, such as California, the lawyer code retains a distinctly local character, although a degree of amalgamation has occurred as those codes themselves serve as models. *See generally* CHARLES W. WOLFRAM, MODERN LEGAL ETHICS § 2.6.5 (1986) [hereinafter MODERN LEGAL ETHICS].

13. A contemporary example is the current controversy over "multi-disciplinary practice," or "MDP," where the organized bar, at both the national and local levels, has contended with the variously observed threat or opportunity of lawyers, teaming with non-lawyers in single organizations, to deliver a variety of services from an array of professional disciplines, such as accounting and law. *See generally, e.g., Business Law Symposium: Multidisciplinary Practice*, 36 WAKE FOREST L. REV. 1 (2001); *The Future of the Profession: A Symposium on Multidisciplinary Practice*, 84 MINN. L. REV. 1083 (2000).

regulation. At that, the *Restatement* project ended–with a sense of reportorial and institutional exhaustion–significantly before the subject of legal regulation of lawyers had been exhausted and with several topics covered in only the most cursory way.[14]

I attempt here to offer some thoughts about when that era of lawyer-regulation began and some possible explanations of how American lawyers came to their present highly regulated state. The causes relate, generally, to the internal logic of the legal regulation of American business and, specifically, to the premises of lawyer regulation. Perhaps of great importance was a change in lawyer ideology that occurred during the mid-nineteenth century, when lawyers apparently shifted their official explanation of their role from one of law guardian to that of client guardian. More importantly, it is surely not coincidental that all of those forces were present in a relatively energized form at a time when the legal profession and the law generally were in a period of enormous stress and considerable self-doubt about its future. For a number of reasons that I will detail, I think it fair to say that the very legitimacy of law and law practice was in serious doubt. I conclude with some personal views about whether the extent of lawyer regulation that we confront today is wise or not, and whether, to the extent it may be unwise, there is anything the organized bar can do about it.

It is my firm belief that law practice is at least as locked into the regulatory state and the alleged litigation explosion[15] now as it will be for the next forty years during which you about-to-be-graduates will practice law. Indeed, there are reasons to believe that, if there is change, law practice will become even more thoroughly regulated by external law. On balance, I do not think that is a bad thing, and such a state of regulation could even do some good, as I will discuss at a later point.

THE FORCES IMPELLING INCREASED LAWYER REGULATION

To an extent, a fully satisfactory explanation for the great upsurge in lawyer regulation in the last three decades probably cannot yet be made. We live too near those times and those of us who lived through them are, in any event, suspect reporters and analyzers of events in which we may have participated. To some

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14. On our somewhat feeble attempts to justify excising certain areas from coverage in the *Restatement*, *see*, *supra* note 1, Introduction, at 3-4.

15. The so-called "litigation explosion" might be one of those well-known events that, on a closer look, appears not to have occurred. On the position that rates of litigation in other countries and at many earlier times in American history far exceeded recent rates in the United States, *see generally* Marc Galanter, *Reading the Landscape of Disputes: What We Know and Don't Know (and Think We Know) About Our Allegedly Contentious and Litigious Society*, 31 UCLA L. REV. 4 (1983); Marc Galanter, *The Legal Malaise; or, Justice Observed*, 19 LAW & SOC'Y REV. 537 (1985); Marc Galanter, *The Day After the Litigation Explosion*, 46 MD. L. REV. 3 (1986). *See also, e.g.*, TERENCE DUNGWORTH & NICHOLAS M. PACE, A STATISTICAL OVERVIEW OF TRENDS IN CIVIL LITIGATION IN THE FEDERAL COURTS (1990) (confirming modest increase in litigation and apparent ability of federal courts to handle increased caseload without significant increase in case disposition time).

extent, serendipity probably played a role–perhaps a major role. For example, twenty-seven of the officials in the Nixon administration who were indicted for crimes in the Watergate crisis of the mid-1970s or named as un-indicted co-conspirators were lawyers.[16] That was hardly an occupational detail overlooked at the time. The constant drumbeat of criminal convictions drove home the point that lawyers, at least in their political activities (and some of their work was indistinguishable from lawyering in general) were not above the criminal law.[17] The role of lawyers in Watergate sent shock waves through the consciousness of American lawyers, and the criminal involvement of lawyers in Watergate-related offenses was constantly played upon in the media. That attention led to some specifically Watergate-generated tightening of lawyer discipline on the part of the organized bar.[18] Nevertheless, other forces were already building to subject lawyers to more stringent regulation. Moreover, lawyer involvement in political crises — and sometimes on the wrong side of such crises — has occurred at other times in American history without a vast upsurge in lawyer regulation. For the forces that shaped lawyers' present regulatory situation, we must dig deeper.

In brief, my thesis describes five factors or conditions that generally explain the historical process by which lawyers have come to be heavily regulated. There are undoubtedly others, but I believe these are the primary factors. As will be seen, some were developments already well in place at the beginning of the twentieth century or even earlier. It was the confluence of these historical conditions through a triggering event that destabilized the legal profession. That process has, I believe, led to the present highly regulated state of American lawyers.

The first factor deals with the emergence of courts as the regulators of lawyers and their continuation in that unchallenged role. Courts have both legitimized lawyers' modern professional organizations and much of their work. Courts, however, have become highly active in recent decades in creating law and

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16. *See N.O.B.C. Reports on Results of Watergate-Related Charges Against Twenty-Nine Lawyers*, 62 A.B.A. J. 1337 (1976) (reporting on release of study by Special Committee on Coordination of Watergate Discipline of National Organization of Bar Counsel indicating that twenty-seven lawyers were named as defendants or unindicted co-conspirators in criminal proceedings arising out of Watergate and two others were the subject of public bar discipline). On the contemporary media attention paid to lawyer involvement in Watergate offenses, *see* the collection of references and the analysis in Jerold S. Auerbach, *The Legal Professional After Watergate*, 22 WAYNE L. REV. 1287 (1976).

17. *See* Charles W. Wolfram, *Lawyer Crimes–Above the Law?*, 36 VAL. U. L. REV. 73 (2001).

18. *E.g.*, ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. No. 336 (1974) (holding that a lawyer, whether acting in professional capacity or otherwise, is bound by applicable disciplinary rules of then-applicable *Code of Professional Responsibility*); ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. No. 337 (1974) (holding that, with limited exceptions, lawyer may not electronically record conversation with any third person, without consent of all parties to conversation, regardless of law so permitting). The latter opinion has recently been overturned. *See* ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. No. 01-422 (2001).

enforcing it, primarily through tort recoveries, and ultimately in enforcing lawyers' own law against lawyers.

The second factor involves the adaptability of the American legal professional form to the regulatory state. A main project of bar associations since the late 1960s has been validating the bar's claim to self-regulation by enhancing the state of lawyer discipline. That enhancement of discipline, I argue, has laid the groundwork for even more extensive regulation of the legal profession.

The third factor considers how the modern regulatory state has turned on its lawyer creators. The vastly broadened scope of regulation of almost all other professions and all forms of business has made it politically and intellectually impossible for lawyers to claim exemption from regulation.

The fourth factor concerns the profound transformation in lawyer ideology from the self-image of a free professional to the self-image of a zealous advocate. This transformation occurred gradually around the middle of the nineteenth century and has become the bedrock of modern professional orthodoxy. As a result, as I will argue, claims that the bar otherwise might have made against heightened regulation were weakened, thus ensuring the erosion of the bar's own independence.

The fifth factor deals with those stresses within our society that affected American law and the American legal profession. These stresses created a fertile ground for legal change to occur and appear to have combined as its triggering force.

A. EMERGENCE OF COURTS AS THE REGULATORS OF LAWYERS

The first factor I examine finds historical origins in the intertwined role of courts and legislatures in lawyer regulation during pre-Revolutionary times, and emerges in the middle decades of the twentieth century with courts as the dominant partner in the relationship. By no means was it always the case that courts alone could or should regulate lawyers. Regulation of lawyers through legislation was an embryonic element congenial to the American colonial legal culture that relied on English legal norms and the undoubted and historical role of Parliament in regulating English lawyers. Legislative regulation of lawyers was already commonplace in most of the colonies at the time of American independence. Then, as now, lawyers' practices raised concerns among citizens, and citizens complained. However, legislators responded without the hesitation we see today. It was not at all uncommon during the colonial period for the local legislative body to enact lawyer regulations, typically relating to upper limits on their fees, which appear to have been a constantly recurring political issue until well past the American Revolution.[19] Those statutes were clearly

19. *E.g.*, 1 ANTON-HERMAN CHROUST, THE RISE OF THE LEGAL PROFESSION IN AMERICA 199 (1965) [hereinafter CHROUST, THE RISE OF THE LEGAL PROFESSION] (referring to a 1750 New Jersey legislation

examples of politicians responding to constituent complaints about excessive legal fees.

The statutes also reflect legislative confidence in remedying the worst of lawyers' perceived distressing practices. No record has survived of any radical resistance to enforce such legislation on the parts of judges. Indeed, enactments can be found in many colonies in which the very judicial power to admit lawyers to practice and thereafter discipline them was conferred and regulated by legislation.[20] The prevalence of legislative regulation of lawyers remained the accepted arrangement throughout much of the nineteenth century. Decisions in many jurisdictions either affirmed the power of the legislature to regulate lawyers or, more often, simply assumed such a power.[21] There were even instances, far less common and of no sustained life span, in which courts did not wield disciplinary powers over lawyers. In early eighteenth-century New York, for example, the power to disbar, suspend, and readmit lawyers was vested in the Governor and the state supreme court.[22] In addition, a lawyer was charged in 1669 by the lower house of the Maryland Colonial Assembly with conflicts of interest and collecting excessive fees, with the charges tried in the upper house where the lawyer was acquitted.[23]

At the same time, while courts were initially not in a position to assert much power over lawyers if opposed by other branches of the government, the deference generally given to courts ensured their eventual ascendancy over lawyers. In other legal cultures, such as those of Continental countries, lawyers and judges have not been allied professionally, politically, or historically. But, in both England and America, there has never been any significant difference between judges and lawyers in their background, training, mutual set of expectations about the nature of the work that each would perform, professional ambitions, or professional culture. American lawyers and judges essentially move in the same circles and march to the same drummers; and aside from stress caused by periodic conflict between royal administrators and colony-centered lawyers, that was the case before the American Revolution, and that clearly remained the case after the Revolution. Moreover, given the English model–from which all of the colonies naturally worked–it was the courts to which lawyers

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regulating law practice and setting upper limits on lawyers' fees); *see generally* John Leubsdorf, *Toward a History of the American Rule on Attorney Fee Recovery*, 47 LAW & CONTEMP. PROBS. 9 (1984) (tracing history of fee-shifting legislation and court rules in pre-Revolutionary America).

20. *E.g.*, CHROUST, THE RISE OF THE LEGAL PROFESSION, *supra* note 19, at 221 (referring to a Pennsylvania statute of 1710-11 providing that judges of Philadelphia courts could "admit any attorney or attorneys to plead . . . and upon the misbehavior of such attorney or attorneys . . . suspend or prohibit their pleading").

21. *E.g.*, Leigh's Case, 15 Va. (1 Munf.) 468 (1810) (holding that applicant for law license was not applying for an "office or place, civil or military, under this Commonwealth" within meaning of statute requiring oath against dueling).

22. *See* CHROUST, THE RISE OF THE LEGAL PROFESSION, *supra* note 19, at 157-58. Similarly, 1732 legislation in Virginia gave disciplinary powers to "the governor and council." *Id.* at 274.

23. *Id.* at 248.

were admitted and whose judges would exercise the power to suspend or disbar a lawyer.[24] Thus, it was natural that courts, as the convenient expression of relevant official power, should assert some degree of control over lawyers, and that lawyers should accede to that power and even welcome it, as long as the leash was kept appropriately slack. For this, American courts could find validation–quite solid at the time–in the parallel role of the English law courts as the customary regulators of lawyers. In fact, courts in many states would cite English decisions on lawyer discipline as comfortably as they did decisions from other states. Many American courts referred to their disciplinary function as an aspect of the common law or, if different, as an inherent power of any court, using a mental model that was very English. As courts became more "activist" in the latter part of the twentieth century, the traditional role of courts as occasional disciplinarian and, more powerfully, the protectors of the legal profession changed to a posture of jealous judicial warden.

1. THE SELF-TRAP SET BY THE BAR CAMPAIGN FOR "INHERENT POWERS" OF COURTS

With regulation becoming more demanding, lawyers and their bar organizations are finding it more difficult to argue that courts are inappropriate inspectors of the minutiae of law practice. Beginning in the 1930s, and building on efforts first made during the last decades of the nineteenth century in beating back threatened competition from land title insurance companies and trust companies, the organized bar made a sustained effort to convince courts to adopt a robust and legally exotic notion of "inherent powers."[25] Under what sometimes became a flat-earth concept of separation of powers under state constitutions, courts held in many states that only the judicial branch–and no other branch of government–was permitted to regulate lawyers.[26] This most peculiar but widely-accepted (by courts, of course) constitutional doctrine is almost laughably wooden and ill-defended, and it is not applied in many instances where its logic would seem to apply.[27] Its impetus lies not so much in rational constitutional doctrine as in the

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24. On the judge-centered process of professional discipline through a period two-thirds of the way through the twentieth century, *see* Wolfram, *Origins*, *supra* note 5.

25. *See, e.g.*, Deborah L. Rhode, *Policing the Professional Monopoly: A Constitutional and Empirical Analysis of Unauthorized Practice Prohibitions*, 34 STAN. L. REV. 1, 6-10 (1981) (tracing historical background of unauthorized practice efforts of organized bar in 1930s).

26. *See* MODERN LEGAL ETHICS, *supra* note 12, at § 2.2.3; *see also* Charles W. Wolfram, *Lawyer Turf and Lawyer Regulation–The Role of the Inherent-Powers Doctrine*, 12 U. ARK. LITTLE ROCK L. REV. 1 (1989).

27. Among other serious gaps, the federal courts have shown no similar exuberance in preventing legislative regulation of lawyers. *E.g.*, *Ex Parte* Garland, 71 U.S 333, 379-80 (1866) (accepting the statutory regulation of the practice of law). This has produced some few notable statutory regulations of lawyers. On a short list of examples, one would include application of the federal antitrust statutes to lawyer regulation by bar associations, which had long been accepted by state courts. *See* Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975) (holding that bar-sponsored minimum fee schedules were illegal price-fixing under federal antitrust statutes). The Court has accepted that Congress may regulate the practice of law by permitting nonlawyers to represent clients in adversary proceedings in the Patent Office. *See* Sperry v. Florida *ex rel.* Fla. Bar, 373 U.S.

imperatives of rather naked political power struggles between the judicial branch and the other branches. Whatever the reason, rigid insistence on the exclusive power to regulate lawyers has left courts with no other branch to blame when the public–often through a politician in another branch of government–complains about socially undesirable lawyer conduct, thus providing a powerful impulse to judicial ideas about lawyer discipline. One practical consequence is that lawyers who may object to a proposed new form of lawyer regulation by the courts are stripped of what on other occasions may be a more or less powerful complaint about the illegitimacy of an attempted use of government power. Lawyers and their bar organizations, having been very insistent on the most radical forms of the inherent powers doctrine, could not consistently accuse the same courts of overreaching in their attempts to regulate the legal profession.

2. THE "NATURAL FIT" BETWEEN LAWYERS AND COURT REGULATION

The device of law-creation by courts through their very widely accepted common-law powers, a unique feature of judicial jurisprudence in the Anglo-influenced world, has seen entire bodies of law created by courts and, although to a decreasing extent, still very heavily shaped by common-law decisions. One of the principal areas in which courts have long played that dominant role is the law of torts. The juxtaposition of courts as the holders of the "inherent" power to regulate lawyers, as well as their law-making power through common-law adjudication, has given courts particular leverage when it has come to the common-law regulation of lawyers.

At the same time, lawyers have always been, and still are politically vulnerable. Anti-lawyer sentiment among the general population has been a constant ever since anecdote and social science have been able to measure. Often, that unpopularity could spell political vulnerability were it not for the protective role of courts which, particularly in the latter part of the twentieth century, stood ready to strike down what the bar perceived to be unwise legislative or administrative regulation. Lawyers have thus needed courts for political cover at least as much as courts have needed lawyers for their own political agendas. The fit is not accidental. Lawyers are constants in the life of judges, but only rarely and selectively do they intrude upon the thoughts of most occupants of the other political branches. Judges mainly start out as lawyers and only later migrate into a

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379, 403-04 (1963) (holding that, under the Supremacy Clause, state was without power to prosecute for violation of state unauthorized practice statute non-lawyer practitioner properly admitted to practice before U.S. Patent Office). More recently, the United States Supreme Court has held by a large majority that the Federal Fair Debt Collection Act applies to lawyers. *See* Heintz v. Jenkins, 514 U.S. 291 (1995). Whether under the impetus of the Supreme Court or for other reasons, courts in every state have, to a greater or lesser degree, stopped short of invalidating all legislation that on its face or as construed would apply to lawyers. *See generally* MODERN LEGAL ETHICS, *supra* note 12, at § 2.2.3 (examining decisions invoking concept of judicial comity with legislature as ground for not invalidating statutes regulating lawyers).

judicial role, from which they increasingly cycle again into active law practice after a period on the bench. The resulting natural fit between the office of judge and the need for lawyer regulation, coupled with the mid-twentieth century judicial claim of unique dominion over lawyers, has made the case for a high degree of judicial regulation of lawyers compelling. That and other forces have produced truly spectacular results in the application of common-law rules to lawyers.

Where all this eventually led is dramatically portrayed by the American law of legal malpractice. That law, in doctrinal terms, changed little over much of the nineteenth and twentieth centuries. But its rate and intensity of application have skyrocketed in recent decades. As part of that ramping-up, but not in my view contributing to the early years of steep increase, has been a proliferation of new theories and remedies for malpractice.[28] A graph published in *Legal Malpractice,* the standard American practitioner's treatise on legal malpractice by Mallen and Smith, shows that the number of reported malpractice decisions were very few from the 1790s up to 1959.[29] But a spectacular increase began in the 1960s and continued through the 1970s and beyond.[30] The rate of increase has slackened somewhat in more recent years, but the frequency and severity of claims, that is the amount of money awarded in damages or produced by settlement, have remained at historical highs.[31] In short, both the number of legal malpractice suits being filed and the overall success rate of legal-malpractice plaintiffs have risen; and both these increases have occurred recently and rapidly. Law firms, in order

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28. *See generally* 1 RONALD E. MALLEN & JEFFREY M. SMITH, LEGAL MALPRACTICE, Part III (4th ed. 1996) (discussing the variety of theories available and their recent proliferation) [hereinafter MALLEN & SMITH]; John Leubsdorf, *Legal Malpractice and Professional Responsibility*, 48 RUTGERS L. REV. 101 (1995) (discussing the increase in client damage suits and theories of recovery available); Manuel R. Ramos, *Legal Malpractice: The Profession's Dirty Little Secret*, 47 VAND. L. REV. 1657 (1994) (discussing the recent increase in legal malpractice litigation); Roy Ryden Anderson & Walter W. Steele, Jr., *Fiduciary Duty, Tort and Contract: A Primer on the Legal Malpractice Puzzle*, 47 SMU L. REV. 235 (1994) (discussing the development of the three-mentioned theories); Susan Taylor Wall & Joseph R. Weston, *An Analysis of Current Theories of Liability*, 45 S.C. L. REV. 851 (1994) (assessing developing trends in legal malpractice theories). The proliferation of theories has produced some backlash, consisting of arguments for narrowing of some theories. *E.g.*, Meredith J. Duncan, *Legal Malpractice by Any Other Name: Why a Breach of Fiduciary Duty Claim Does Not Smell as Sweet*, 34 WAKE FOREST L. REV. 1137 (1999) (arguing that breach of fiduciary duty claims should be severely limited to instances in which lawyer has either: (1) committed criminal offense injurious to client, (2) perpetrated scheme to defraud client, or (3) caused actual harm to client by breach of fiduciary duty).

29. *See* MALLEN & SMITH, *infra* note 30, § 1.6, at 19.

30. Prior to the 1960s, the number of legal malpractice decisions was quite flat, with significant blips only in mid-nineteenth century and again, but more modestly, in the 1890s. *See id.* The Mallen & Smith statistics also clearly illustrate that legal malpractice decisions grew at a rate that lagged behind such possible measures as the number of lawyers or the size of the general population. *See id.* at 20-21. The rate of increase in legal malpractice decisions since the 1960s has far exceeded the rate of increase in the size of the legal profession. *See id.*

31. *See* ABA Standing Comm. on Lawyers' Professional Liability, Profile of Legal Malpractice Claims: 1996-1999 (2001) (comparing recent data with comparable data from 1990-95 and 1983-85, this report reflects a fourteen-year stability in high rates and levels of recovery, with claim activity tracking the economy by producing intensification of activity following economic slowdown).

to protect their ongoing ability to remain in business, and lawyers, in order to protect their substantial personal assets, have increasingly sought the protection of legal-malpractice insurance policies. The increase in the number of insured firms and lawyers–a form of liability insurance that was almost unknown as recently as the early 1940s–might itself have contributed to the increase in legal malpractice suits and the size of recoveries, because plaintiffs and jurors have both come to appreciate the deep-pocket protection that lawyers and their firms possess.[32] A possible consequence of the flourishing of malpractice insurance is that clients who otherwise would be loath to sue their own lawyer may now do so on the expectation that any loss will be covered by insurance and cause the defendant lawyer no actual financial loss.[33] Reflecting at least indirectly the rates of recovery against lawyers, the premiums for such protection have steadily risen.[34]

To some extent, the increase in legal malpractice liability and litigation is traceable to judicial activism, involving the more exuberant use by courts of their common-law powers. Among the most notable of these are common-law decisions such as those refusing to apply traditional, strict notions of contractual privity to bar all suits by non-clients against lawyers.[35] Perhaps of greater importance was the ready acceptance by courts of newly-sharpened lawyer code rules as an appropriate measure or articulation of pre-existing but more general grounds of liability.[36] Of roughly equal importance, courts have simply become

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32. *See, e.g.*, George M. Cohen, *Legal Malpractice Insurance and Loss Prevention: A Comparative Analysis of Economic Institutions*, 4 CONN. INS. L.J. 305, 345 (1997); Kent Syverud, *On the Demand for Liability Insurance*, 72 TEX. L. REV. 1629, 1629 (1994). Belief in such consequences have reportedly led some lawyers to "go bare" (practice without malpractice insurance) in order not to serve as a magnet for other lawyers looking for a claim. *See* Jill Schachner Chanen, *Umbrella Coverage vs. Going "Bare,"* 84 A.B.A. J. 72, 73 (Sept. 1998) ("And many even see malpractice insurance as a magnet for other lawyers looking for a claim. 'I believe insurance triggers lawsuits, and insurance companies have a tendency to pay off.' " (quoting Charlotte Coats-Siercks)). The strategy, of course, "works" only if the lawyer makes it widely known that he or she is without insurance (which seems highly unlikely as a matter of marketing) or, after being sued, successfully persuades the claimant to dismiss the claim after informing claimant's lawyer of that fact. The strategy also assumes, obviously, that the lawyer has few professional or personal assets that are exposed to judgment and thus worth protecting. In short, the strategy works mainly for those lawyers whose professional and financial situation is such that insurance would be inefficient for them in any event.

33. *See* Cohen, *supra* note 32, at 345 (citing Susan Korenvaes Robin, Note, *Attorney Malpractice and Preventive Lawyering: Are Attorneys Safer in Large Firms?*, 40 U. MIAMI L. REV. 1101, 1105 (1986)).

34. *See, e.g.*, Edward A. Adams, *Malpractice Rate Hikes to Spread?*, NAT'L L.J., Oct. 26, 1992, at 3 (reporting 10-20% annual raise in malpractice premiums spreading from New York City to other cities).

35. *E.g.*, Lucas v. Hamm, 364 P.2d 685, 689-91 (Cal. 1961) (holding that the lawyer who negligently drafted a will was liable to non-client intended beneficiary; however, defect caused by violation of rule against perpetuities cannot be basis for finding of lack of "ordinary skill and capacity" because ordinary lawyers cannot comprehend its intricacies).

36. *See generally* RESTATEMENT, *supra* note 1, at § 52, cmt. *f* & Reporter's Note (noting use of lawyer code rules as measures of liability and citing decisions so authorizing); Ellen S. Podgor, *Criminal Misconduct: Ethical Rule Usage Leads to Regulation of the Legal Profession*, 61 TEMPLE L. REV. 1323 (1988); Charles W. Wolfram, *The Code of Professional Responsibility as a Measure of Attorney Liability in Civil Litigation*, 30 S.C. L. REV. 281 (1979); Kathleen J. McKee, Annotation, *Admissibility and Effect of Evidence of Professional*

more hospitable forums in which to assert anti-lawyer claims. The courts no longer look on client and, to a lesser extent, non-client claims against lawyers as broadly threatening to the independence or stability of the legal profession. Most courts now seem to accept legal malpractice recoveries as a legitimate cost of conducting a law practice and as a right of a client injured by a lawyer's substantial default.

The steep increase in legal malpractice litigation has been accompanied by an increase in the incidence of other lawyer-defendant litigation, all largely attributable to the increased receptiveness of common-law courts to such claims. Decisions in many states have permitted non-clients to sue lawyers for certain types of wrongs, which was virtually unknown, aside from intentional torts, prior to 1970. Clients have received increasing protection from courts in fee disputes with lawyers.[37] Remedies for conflicts of interest have skyrocketed in application, most notably in the form of the disqualification motion.[38] While that remedy has existed in form for centuries, its vigorous use by courts, particularly federal courts, since the 1970s has produced a great increase in such motions.[39] All of these developments, at least in significant part, can be traced to increased activism on the part of courts in their traditional governmental role as the visitorial body empowered to regulate lawyers–uniquely so, according to the dominant state-law view. Rising malpractice litigation has also been brought about by a greatly increased willingness on the part of lawyers to bring charges of conflict of interest against brother and sister lawyers–a development that is unique to the period of 1970 onward.[40]

B. PRESENT FROM THE CREATION: THE ADAPTABILITY OF THE AMERICAN LEGAL PROFESSIONAL FORM TO THE REGULATORY STATE

The second part of my thesis is the following social fact: despite its claims of professional prowess and independence, the American legal profession is subject to the wheels of political and social fortune just like many other occupational groups. This part of the thesis generally concerns the way in which the American legal profession has evolved as a political and social institution. My point is that

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Ethics Rules in Legal Malpractice Action, 50 A.L.R.5th 301 (1997); Note, *The Evidentiary Use of the Ethics Codes in Legal Malpractice: Erasing a Double Standard*, 109 HARV. L. REV. 1102 (1996).

37. *See* RESTATEMENT, *supra* note 1, at §§ 34, 37-42 (noting limitations on contractual powers of lawyers and expansion of remedies available to clients with respect to questions of attorney fee charges).

38. *See id.* at § 6(8) & cmt. *i* (reviewing disqualification remedy); *see generally* MODERN LEGAL ETHICS, *supra* note 12, at § 7.1.7 (noting increase in disqualification motions).

39. *See* Kenneth L. Penegar, *The Loss of Innocence: A Brief History Of Law Firm Disqualification in the Courts*, 8 GEO. J. LEGAL ETHICS 831 (1995) (showing vast increase in disqualification motions since 1970s); *see id.* at 889-93 (presenting data on rate and timing of increase).

40. In the 1960's and earlier, there was widely thought to exist a "conspiracy of silence" under which bar pressure kept lawyers from either representing clients in lawsuits against their former lawyers or appearing as expert witness for such a client. *See* MODERN LEGAL ETHICS, *supra* note 12 at 22, 207-08.

the kind of bar associations that emerged–long after the first organized bars were formed in the 1870s and well into the middle of the twentieth century–and the projects they then undertook of co-opting the courts into "self-regulatory" work–transformed the dominant bar associations directly involved in bar discipline from private clubs into quasi-governmental organs. This transformation is reflected in the "integrated" or mandatory bar associations now found in many states. Even in states without mandatory bars, the allegedly private state bar associations have served as originators of bar disciplinary systems and rules. The national bar, personified in the American Bar Association, has played a similarly supportive role in enhancing lawyer discipline. As the bar became increasingly serious about self-regulation, the bar found it impossible to keep lawyers immune from other forms of regulation that had been inflicted on so many other occupational groups.

A principal illustration of this development is the frequently cited study of the state of lawyer discipline published in 1970 by a blue-ribbon committee of the American Bar Association, chaired by a sitting Supreme Court Justice, Tom Clark. That study–known uniformly as the Clark Report–made mainly clear-eyed statements about the woeful state of lawyer discipline that then prevailed and issued a famous clarion call for professional action on the perceived crisis. Whether uniformly wished for or not, the response of the organized bar was impressive, perhaps much more so than sponsors of the Clark committee study initially intended, and has certainly had continuing repercussions that have moved far past the recommendations of the Clark committee. The date of the Clark Report–1970–provides the reason, or excuse, for my selection of that year as the beginning of a new era in lawyer discipline.

The direct consequences of the Clark study were impressive in their own right. The study coincided with the ABA's promulgation, a year earlier, of the ABA *Model Code of Professional Responsibility*[41]–the first reworking of the ABA's recommended lawyer code since the 1908 *Canons of Ethics*. Quite unlike the 1908 *Canons*, the 1969 *Code* was explicitly regulatory in purpose and design. Its wording and approach do not resemble the hortatory face of the 1908 *Canons*.[42] Furthermore, the *Code's* segregation of mandatory text into "disciplinary rules" makes the point graphic.[43] The *Code* was hardly a mere gesture by the bar. On its

41. This was almost certainly no coincidence, of course. The same ABA leadership that was pushing for final ABA approval of the 1969 ABA *Model Code of Professional Responsibility* was also responsible for creation and appointment of the Clark committee.

42. *See* Geoffrey C. Hazard, Jr., *The Future of Legal Ethics*, 100 YALE L.J. 1239, 1241, 1249-60 (1991).

43. *See generally* Fred C. Zacharias, *Specificity in Professional Responsibility Codes: Theory, Practice, and the Paradigm of Prosecutorial Ethics*, 69 NOTRE DAME L. REV. 223 (1993). The reverse point has also been made that the sharpening of the regulatory focus of lawyer codes has led to a de-moralization of legal ethics. *See generally* David Luban & Michael Millemann, *Good Judgment: Ethics Teaching in Dark Times*, 9 GEO. J. LEGAL ETHICS 31, 41-46 (1995). That effect is seen most dramatically in the 1983 ABA *Model Rules of Professional Conduct* and the 2000 *Restatement of the Law Governing Lawyers*. However, the Weberian

approval by the policy-making ABA House of Delegates, another ABA committee was appointed and worked assiduously and successfully to secure adoption of the 1969 *Code* in almost every state.[44] At much the same time, and in direct response to the Clark Report, the ABA undertook the task of re-shaping the regulatory and procedural apparatus by which lawyers were disciplined. This much less well-known effort, which was as uniformly successful as was state adoption of the ABA *Code*, provided a more streamlined and efficient mechanism for securing lawyer discipline.[45] This effort was followed less than a decade later by the appointment of a highly activist review committee that in 1983 secured ABA approval of an even more explicitly regulatory set of lawyer rules. With the 1983 *Model Rules of Professional Conduct*, quickly adopted by most states and now adopted by virtually all, regulation of lawyers became an everyday reality.

With the bar and all states showing enthusiasm for at least some forms of lawyer regulation, the bar could not have consistently made it formal policy to resist other forms of lawyer regulation–at least those forms that were controlled, as recent tradition would have it, by courts. And, to be sure, the bar watched such events as the legal-malpractice explosion occur without taking official action. To the contrary, the bar has ostensibly supported that explosion rather than opposing it. The bar has studied such issues as whether to make legal malpractice insurance mandatory, enhancing loss-prevention by lawyers and law firms, inaugurating mandatory continuing legal education programs, showing periodic interest in the curriculum of legal education, and sponsoring a standing committee to chronicle–and often to applaud–the developing law of legal malpractice.

C. REGULATORY FATE: THE RISING REGULATORY TIDE LIFTS ALL BOATS

A third principal influence on the emerging law regulating lawyers is that the machinery of the regulatory state, designed and implemented primarily by lawyers (beginning in the third decade of the twentieth century), has proved inexorable in its appetite–in this instance drawing within its orbit the same profession that unwittingly designed, energized, and nurtured it and that has

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separation of law from morals need hardly lead inevitably to de-moralization. It has occurred because, in the case of the ABA, the size of the modern legal profession (*see infra* text accompanying note 65) makes agreement on propositions that have no firm external reference points difficult if not impossible to achieve and because, in the case of both ABA and ALI, lawyers have feared that vocalizing moral, non-legal considerations will lead to ever-increased levels of regulatory compliance for lawyers.

44. *See* MODERN LEGAL ETHICS, *supra* note 12, at § 2.6.3, at 56 (reporting appointment by ABA of special adoption committee to secure uniform adoption of *Model Code* in states); *Special Comm. to Secure Adoption of the Code of Professional Responsibility*, Report, 97 ABA ANN. REP. 268 (1972).

45. *See* ABA Standards for Lawyer Lawyers Disciplinary and Disability Proceedings (approved February 1979). The 1979 standards were superceded by the ABA *Model Rules for Lawyer Disciplinary Enforcement* (approved August 1989), which were last amended in February 1999. They can be found in Laws. Man. Prof. Conduct (ABA/BNA) 01:601 (Apr. 28, 1999). *See also* ABA Standards for Imposing Lawyer Sanctions (approved February 1986, as amended February 1992), in Laws. Man. Prof. Conduct (ABA/BNA) 01:801 (June 17, 1992).

profited immensely from servicing it or, perhaps more often, from opposing it. Thus, just as much of the rest of the American economy has fallen into the embrace of the administrative state, lawyers–ultimately incapable of fending off regulation any more effectively than their clients–have themselves fallen into its unstoppable regulatory gravitational force.

My point is that lawyers could not have expected to have it both ways–both designing and implementing a regulatory state that would enmesh every other significant element of the American economy yet remain immune from the juggernaut's rush. That amounts to more than telling lawyers they have only themselves to blame.[46] It also reflects the peculiar logic and rhetoric of governmental regulation as it evolved in the United States, which came to characterize the regulatory state and to justify the sweep of the rule of law in such a way that its built-in claims of legitimacy proved far too centripetal for lawyers to escape its force. An important feature of the American regulatory state is that it is not entirely a vast system of administration. Courts and lawsuits have played a decidedly large role in running everything in the private economy and much in the public economy. Were a contemporary reminder needed, the resort of both major political parties to the courts early in the recent dispute over the presidential election in Florida provides it.[47]

The logic of regulation has taken explicit form in the case of lawyers. Although confined largely to the federal government, several notable instances exist in which administrative agencies have either set up and enforced regulatory regimes to deal specifically with lawyers who practice before the agency or used their regulatory authorization and administrative regulations to enforce remedies against lawyers in courts.[48] Typical of the latter has been the episodic efforts of

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46. Many lawyers, of course, worked tirelessly to resist the efforts of New Deal legislators and administrators to build the modern regulatory state. But it is also true that many lawyers contributed to that effort, and most elite lawyers and their firms have profited enormously from the resulting growth in law practice. *See* Nicholas S. Zeppos, *The Legal Profession and the Development of the Administrative State*, 72 CHI.-KENT L. REV. 1119 (1997).

47. *E.g.*, Gerald F. Seib et al., *Legal Eagle: When All Else Fails, The American Way Is to File a Lawsuit*, WALL ST. J., Nov. 14, 2000, at A1 (placing litigation over Florida recount in context of history of litigation over "tobacco, guns, asbestos, abortion, managed health care, Elian Gonzalez [a]nd now, of course, the election of the next president, which seems as likely to be decided in the courtroom as anywhere else. Litigation has become the preferred route for resolving many political and social conflicts that once would have been handled in the political arena or in the marketplace").

48. The most well-known of these has been the federal agency now called the Patent and Trademark Office, which has long possessed and exercised the statutory power to exclude a lawyer from practice before the agency unless the lawyer passes a special examination. *See* 5 U.S.C. § 500(e) (2001). Every other federal agency is required by the Agency Practice Act of 1965, 5 U.S.C. § 500, to admit lawyers to practice before them without special examination. On the preemptive effect of admission to the Patent Office bar, *see* MODERN LEGAL ETHICS, *supra* note 12, at § 15.2.5855-56. Several federal agencies, including the Patent and Trademark Office, also maintain an active system of discipline of admitted practitioners. *See, e.g.*, 37 C.F.R. § 10.20 (2002) (discussing PTO Code of Professional Responsibility); *id.* at § 10.130 (addressing investigations and disciplinary proceedings); Jennifer Stiver Chicoski, Note, *A Trademark Attorney's Ethical Guide to the Patent and Trademark Office and Its Code of Professional Responsibility*, 8 GEO. J. LEGAL ETHICS 1013 (1995). On SEC

the Securities and Exchange Commission to bring damage actions against lawyers for failure to act in accordance with regulatory expectations when servicing clients with issues before the agency.[49]

D. THE TRANSFORMATION OF LAWYER IDEOLOGY: FROM FREE-STANDING PROFESSIONALS TO CLIENT AGENTS

The changing of a key element of American legal ethics and law practice in the mid-nineteenth century also helped to lay the theoretical and intellectual groundwork for later lawyer regulation. During that period, elite lawyers in significant numbers began to turn their backs on an earlier notion of republican professional freedom and independence from their clients. Impelled perhaps by (1) new stronger associations with fewer clients through law-firm practice and (2) the increasingly dominant commercial visions of a society closer to laissez faire than before, elite lawyers came to embrace the diametrically opposing concept that most, if not all, of a lawyer's duties should be conceptualized and impelled by the notion of zealous advocacy, the follow-on precept from the principle that a lawyer's first and most exacting duty was that of maximizing client interests.[50] The client-dominant model of the client-lawyer relationship, although currently the strong professional maxim, hardly goes unchallenged, especially among non-lawyers. It has also been attacked by a range of legal scholars.[51]

The client-dominant model, however, was not always prevalent. As late as 1861, a prominent lawyer addressing law students before the Law Academy of Philadelphia made the following observations about the hazards of law practice.[52] The lawyer, Brewster, first purported to trace the origins of lawyers to monks who emerged from "their cells and studies to come forth with their knowledge of the law, to fight the weak man's battle against the strong man's

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proceedings under the agency's Rule 2(e), *see* Simon M. Lorne & W. Hardy Collcott, *Administrative Actions Against Lawyers Before the SEC*, 50 BUS. LAW. 1293 (1995). Most recently, controversy has surrounded the proposals of the Immigration and Naturalization Service to initiate a system of lawyer discipline, employing some of its own concepts of professional standards. *See* 65 Fed. Reg. 39513 (June 27, 2000) (proposed rules). The established bar has, by and large, fought such apparent competition with state-court regulation. *E.g.*, Lorne & Collcott, *supra* at 1300-03 (showing bar's reaction to SEC efforts); *see generally* MODERN LEGAL ETHICS, *supra* note 12, at § 3.6.2 (noting historic opposition of ABA to federal-agency regulation of lawyers). The dichotomous views of established bar and official organs of law is marvelously described and analyzed in Susan P. Koniak, *The Law Between the Bar and the State*, 70 N.C. L. REV. 1389 (1992).

49. *See* SEC v. National Student Mktg. Corp., 457 F. Supp. 682 (D.D.C. 1978).

50. *See* Michael Schudson, *Public, Private, and Professional Lives: The Correspondence of David Dudley Field and Samuel Bowles*, 21 AM. J. LEGAL HIST. 191, 206-11 (1977); *see also, e.g.*, M. H. Hoeflich, *Legal Ethics in the Nineteenth Century: The "Other Tradition,"* 47 KAN. L. REV. 793 (1999); Robert F. Cochrane, Jr., *The Rule of Lawyers*, 65 MO. L. REV. 571, 576-77 (2000) (book review of WILLIAM H. SIMON, THE PRACTICE OF JUSTICE: A THEORY OF LAWYERS' ETHICS (1998)); Thomas L. Shaffer, *The Unique, Novel, and Unsound Adversary Ethic*, 41 VAND. L. REV. 697 (1988).

51. *See, e.g.*, THOMAS L. SHAFFER & R. F. COCHRAN, JR., LAWYERS, CLIENTS, AND MORAL RESPONSIBILITY (1994); William H. Simon, *Ethical Discretion in Lawyering*, 101 HARV. L. REV. 1083 (1988).

52. *See* F. CARROLL BREWSTER, RIGHT AND DUTIES OF LAWYERS (1861).

oppression. Thus quibble, and point, and technicality had their rise–not in the furtherance of fraud–that is their perversion, but in the honest purpose of protection against wrong. . . ."[53] With the pedigree of pettifoggery thus firmly rooted in doing good, Brewster turned to consider the personal traits important in a good lawyer. Expounding on the importance of "fidelity," he warned that "a lawyer must keep continual watch upon three persons: Firstly, his adversary; secondly, himself; and lastly his client. To return then to my text of Fidelity: I would say, be faithful to the Court with your statements of fact and law; be faithful to your client in guarding his estate and his conscience."[54] Particularly in his call for lawyers to serve as guardians of their clients, Brewster espoused the older professional vision.

Such sentiments were probably either reserved mainly for gullible law students or not as widely practiced as Brewster seems to suggest. Addressing another group of law students, in Albany, New York, in 1855, David Dudley Field expressed similar hope but against a grimmer perception:[55]

> [Y]et I must be permitted to say, that the prevalent notions of professional ethics are, in one respect, too low, and that we must correct them, if we would hold that place which should be ours of right, and perform that amount of good that is within our reach. I refer, of course, to the opinion that one's duty to his client swallows up other duties. . . . The fundamental error, on this head, I suppose to arise from forgetting that the profession of a lawyer is a means to an end, and that end the administration of justice. His first duty is undoubtedly to his own client, but that is not the only one; there is also a duty to the court, that it shall be assisted by the advocate; a duty to the adversary, not to push an advantage beyond the bounds of equity; a duty to truth and right, whose allegiance no human being can renounce; and a duty to the state, that it shall not be corrupted by the example of unscrupulous insincerity.[56]

This, of course, is the same David Dudley Field whose most famous contribution to debates on legal ethics is a very well-known exchange of correspondence with a newspaper editor in 1870-71.[57] Field's sentiments then were much more securely client-centered, and represented far more accurately what had already become, and remains, the dominant professional outlook of American lawyers and their ethical rules.

That evolution in professional ideology was also important for our present

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53. *Id.* at 22.

54. *Id.* at 28.

55. David Dudley Field, *Reform in the Legal Profession and the Laws*, (March 1855), *in* 1 SPEECHES, ARGUMENTS, AND MISCELLANEOUS PAPERS OF DAVID DUDLEY FIELD 494 (A.P. Sprague ed. 1884).

56. *Id.* at 497-98.

57. *See* Schudson, *supra* note 50, at 196-99. Contemporary interest in the Field-Bowles correspondence has been very extensively reinvigorated as the result of its being anthologized in ANDREW L. KAUFMAN, PROBLEMS IN PROFESSIONAL RESPONSIBILITY 410-24 (3d ed. 1989).

purposes. By thus positioning themselves as mere agents of their clients, lawyers were foredoomed by the logic of agency to be held fast by the same force. If that was not to occur at the same time that regulation gripped clients, it eventually followed.

E. A PROFESSION UNDER STRESS: LAWYERS IN THE 1970S AND BEYOND

All of the foregoing factors that lead to the vastly increased legalization of the legal profession in the 1970s had been strongly present for at least several years, even a century. Why, then, did the steep increase in legalization of the legal profession occur only in the 1970s? The chief reason, I believe, was that the social matrix on which any change would have to occur was dramatically changing in the 1970s in ways that have not all played themselves out. Prior to the 1970s, various aspects of the legal profession had seen little change, including (1) the profession's size, (2) its percentages of men (very large) and women (minute) lawyers, (3) its racial composition (predominantly white), (4) the size of law firms, (5) the number of law schools and the size of the law student population, (6) the incomes of lawyers relative to other occupational groups, and (7) the constrained conditions for competition within the legal profession.[58] Some change, of course, occurred during those decades, but it occurred gradually and was comparatively small. No change or combination of changes caused more than cosmetic or otherwise minor adjustments to either the professional agenda of bar associations or the nature of the work that lawyers did for their clients.[59] With each challenge, the bar could confidently confront and either deflect or co-opt any significant attempt to make inroads.

1. 1970S–THE BEGINNING OF SEA CHANGE–LAWYER POPULATION

With the early 1970s, however, came the early ripples of what we can now see as a profound sea change that has produced a fundamental restructuring and re-definition of the American legal profession. The change in size of the legal profession is perhaps the most dramatic and obvious. The legal profession is now an amorphous and polyglot group of over a million lawyers. In California alone, over 100,000 lawyers jostle for influence and livelihoods. That demographic

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58. At least as administered by bar officials, legal ethics to this point was deeply preoccupied with restrictions on advertising and solicitation. One measure was that, as of 1968, over half of all ABA ethics committee opinions dealt with advertising and solicitation. *See* Philip Schuchman, *Ethics and Legal Ethics: The Propriety of the Canons as a Group Moral Code*, 37 GEO. WASH. L. REV. 244, 255-56 (1968); *see generally* MODERN LEGAL ETHICS, *supra* note 12, at § 2.6.6, p. 65 & § 14.2.2 (giving history of regulation of lawyer advertising); *see also infra* text at notes 76-78.

59. Of course, the law itself changed, and sometimes dramatically, as in the effective creation of the regulatory state in the 1930s. But New Deal legislation did not significantly alter lawyers' degree of regulation (or non-regulation) by either legislation, the courts, or their bar associations.

groundswell is almost entirely a product of the changing gender of the bar.[60] Women are now approaching fifty percent of law students nationally,[61] continuing a trend that began in 1968 when the percentage of women students was far less than ten percent.[62] Interestingly, the additional female law students did not displace male students from traditionally male law school seats, for the size and the number of law schools were greatly expanded.[63] Students of color have gained admission at a slower rate than white women, but the growth curve here also continues its upward slope.[64] Diversification of membership in the legal profession has caused the traditional white male leadership to relinquish at least some power to bar leaders that do not necessarily share old assumptions about, among other things, lawyer regulation.

2. GIGANTICISM AMONG LAW FIRMS

An explosion as dramatic as that in the population of lawyers has been the

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60. *See generally* MODERN LEGAL ETHICS, *supra* note 12, at § 1.4.3.

61. *See* Jonathan D. Glater, *Women Are Close to Being Majority of Law Students*, N.Y. TIMES, March 26, 2001, at A1 (reporting new ABA figures showing 49.4% women among 2000-01 law students, with more women than men applying for 2001-02).

62. *See* RICHARD L. ABEL, AMERICAN LAWYERS 284 (1989) (showing varying estimates of percentage of women law students in 1970, ranging from 2.8% to 5.1%). The figure of 10% reported from the ABA as the percentage for 1970 (*see* Glater, *supra* note 64) would be wildly high, and perhaps was a misunderstanding of a figure quoted for a later year. On the history of women in law, including in legal education, *see generally* KAREN B. MORELLO, THE INVISIBLE BAR: THE WOMAN LAWYER IN AMERICA, 1638 TO THE PRESENT (1986). The appearance of women in law schools did not, of course, mean that male students and, perhaps worse, male faculty readily accepted the change. *See generally* LANI GUINIER ET AL., BECOMING GENTLEMEN: WOMEN, LAW SCHOOL, AND INSTITUTIONAL CHANGE (1997); LINDA F. WIGHTMAN, WOMEN IN LEGAL EDUCATION: A COMPARISON OF THE LAW SCHOOL PERFORMANCE AND LAW SCHOOL EXPERIENCES OF WOMEN AND MEN (1996) (reporting on study conducted under auspices of Law School Admission Council). Correspondingly, the contemporary presence of large numbers of women among the ranks of practicing lawyers does not mean that barriers to career advancement, successful practice, judgeships, and other professional points of aspiration have been effectively lowered. *See generally, e.g.*, Elizabeth Chambliss & Christopher Uggen, *Men and Women of Elite Law Firms: Reevaluating Kanter's Legacy*, 25 LAW & SOC. INQUIRY 41 (2000); Elizabeth Mertz, *From the Trenches and Towers,* 25 LAW & SOC. INQUIRY 393 (2000) (reflecting on longitudinal study of careers of one elite law school's minority graduates).

63. U.S. DEP'T OF COMMERCE, BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES 48 (2001) (providing relevant statistics); BARBARA A. CURRAN, WOMEN IN THE LAW: A LOOK AT THE NUMBERS 8-9 (1995) (because of steep increase in total numbers of law students, increased percentages of women law students have not displaced male students). The generally excellent study of modern legal education is that of ROBERT STEVENS, LAW SCHOOL: LEGAL EDUCATION IN AMERICA FROM THE 1850S TO THE 1980S (1983). Despite its subtitle, however, Stevens' book deals in only a perfunctory way with legal education developments that occurred much after the 1960s.

64. *See generally*, MODERN LEGAL ETHICS, *supra* note 12, § 1.4.2, at 9-10. Even more than with women lawyers, *see infra* note 65, minority lawyers have found acceptance and equal opportunity within the legal profession slow to arrive. *E.g.*, ABA Commission on Opportunities for Minorities in the Profession, Miles to Go: Progress of Minorities in the Legal Profession (1998); David B. Wilkins, *Partners Without Power? A Preliminary Look at Black Partners in Corporate Law Firms*, 2 J. INST. STUD. LEGAL ETHICS 15 (1999); David B. Wilkins & G. Mitu Gulati, *Why Are There So Few Black Lawyers in Corporate Law Firms? An Institutional Analysis*, 84 CAL. L. REV. 493 (1996); Jonathan D. Glater, *Law Firms Are Slow in Promoting Minority Lawyers to Partnership*, N.Y. TIMES, Aug. 7, 2001, at A1 (reporting newspaper study of large law firm partnership ranks).

coincidental explosion in the size and complexity of large American law firms,[65] a development that also began in the 1960s and 1970s.[66] While traditional explanations of growth have centered on supply-side theories, primarily involving profit-maximization by large-firm partners,[67] an alternative, demand-side theory is that the "project" approach possible in large firms is increasingly attractive to clients in a complex, inter-disciplinary world of commerce and industry.[68] The size of the largest law firm in 1960 would not allow the same firm to rank among today's 250 largest firms.[69] The largest two law firms now have over 2500 and over 1500 lawyers, respectively.[70] At least for lawyers in large law firms,[71] incomes have soared,[72] as have the incomes of celebrity lawyers in much smaller firms. That figure itself reflects both increased legal regulation of business in general and increased commercialization of law practice. Moreover, the complexity of law-firm practice now includes legal issues that were entirely unknown prior to the 1960s, such as compliance with such legal requirements as anti-discrimination statutes.[73]

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65. *See generally* MARK STEVENS, POWER OF ATTORNEY: THE RISE OF THE GIANT LAW FIRMS (1987); MARC GALANTER & THOMAS PALAY, TOURNAMENT OF LAWYERS: THE TRANSFORMATION OF THE BIG LAW FIRM (1991) (hereinafter GALANTER & PALAY); *see also, e.g.*, Michael D. Goldhaber, *Among 2000's Lessons: The Big Get Bigger, the Small Stay Pretty Small*, NAT'L L.J., Dec. 4, 2000, at A1 (reporting on annual survey of survey of large firms, showing that number of lawyers in 250 largest firms now approaches 100,000, from slightly over 20,000 in 1980; "giant" firms of more than 500 lawyers grew at 14% average rate in preceding year while smallest–those with fewer than 200 lawyers–grew at "an anemic 2.5%"; and with firm size of at least 153 for inclusion on top-250 firm list).

66. *See generally* Abel, *supra* note 65, at 311 (showing large rate of increase in size of law firms during that period and into the 1980s).

67. *See* GALANTER & PALAY, *supra* note 65.

68. *See* Randall S. Thomas et al., *Megafirms*, 80 N.C. L. REV. 115 (2001).

69. In the latest survey of the largest 250 American law firms conducted annually by the NATIONAL LAW JOURNAL newspaper, the smallest firm was a 158-lawyer Washington, D.C., which had lost 36 lawyers and fallen from 192 to last (250) place on the chart. *See The NLJ 250*, NAT'L L. J., Nov. 19, 2001, at C16. That was nonetheless considerably larger than the largest law firm in the early 1960s.

70. *See The NLJ 250*, *supra* note 69, at C13 (listing Baker & McKenzie at 2771 lawyers and Skadden, Arps, Slate, Meagher & Flom at 1567 lawyers as two largest American law firms).

71. One of the apparently stark truths about the American legal profession is its "hemispheres" of practice, with an elite segment of lawyers, educated at the "better" law schools, practicing in larger law firms, and earning higher incomes practicing law for wealthy and corporate clients, while a larger but less socially prominent segment, more likely educated at lesser-known law schools or at night, practicing solo or in small firms, and with clients with modest incomes and legal problems of modest kind. *See* JOHN P. HEINZ & EDWARD O. LAUMANN, CHICAGO LAWYERS: THE SOCIAL STRUCTURE OF THE BAR (1982). More recent studies by the same group confirms the stratification in such things as the types of organizations served in lawyers' pro bono effort, *see* John P. Heinz & Paul S. Schnorr, *Lawyers' Roles in Voluntary Associations: Declining Social Capital?*, 26 LAW & SOC. INQUIRY 597 (2001). On the uneven distribution of income among lawyers, *see generally* Kenneth G. Dau-Schmidt & Kaushik Mukhopadhaya, *The Fruits of Our Labors: An Empirical Study of the Distribution of Income and Job Satisfaction Across the Legal Profession*, 49 J. LEGAL EDUC. 342 (1999).

72. *E.g.*, Philip Connors, *Lawyers Turn Tidy Profits as Clients Make Deals*, WALL ST. J., July 2, 1999, at B1 (reporting survey of lawyer incomes at largest law firms, showing 11.4% increase in per-partner income to $622,000).

73. *E.g.*, Amanda DeVincentis, Note, *Navigating the Borders: A Proposal for General Civility Legal Ethics on Sexual Harassment*, 13 GEO. J. LEGAL ETHICS 521 (2000).

Relationships among large-firm partners have also changed in ways that tend to isolate lawyers professionally as each competes with his or her fellow partners for their limited slice of the pie of law firm net profits.[74] One of the most dramatic alterations caused by the vast growth of large law firms is the transformation of the role and function of the mass of young lawyers whose work is integral to client service in those firms. Both the demands for hourly billings and the corresponding demand for more work for such lawyers have risen among large firms in direct proportion to their skyrocketing salaries. The resulting "bird-in-a-gilded-cage" professional life of large-firm associates has produced, among other things, its own upwelling of cynicism and general angst.[75] Movements of lawyers between law firms, once almost unheard of, have become so common in recent decades as to give rise to an entire industry of legal search firms, businesses who do nothing but "head hunt" for "laterals."[76]

3. THE BUSINESS OF LAW–MARKETING AND THE EROSION OF CLIENT LOYALTY

Law is now clearly a business, if, debatably, it also remains a profession. Through decisions of the United States Supreme Court based on constitutional protection of lawyer advertising and occasional threats of antitrust enforcement in the federal government, lawyers can now freely advertise, and although only in the District of Columbia, openly solicit clients.[77] Lawyers and law firms openly

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74. *See* Ronald J. Gilson & Robert H. Mnookin, *Sharing Among the Human Capitalists: An Economic Inquiry into the Corporate Law Firm and How Partners Split Profits*, 37 STAN. L. REV. 313 (1985).

75. *See* Ronald J. Gilson & Robert H. Mnookin, *Coming of Age in a Corporate Law Firm: The Economics of Associate Career Patterns*, 41 STAN. L. REV. 567 (1989); Debra Baker, *Cash-and-Carry Associates*, A.B.A. J. (1999), at 41 (stating effect of high associate salaries, but long hours, little mentoring, and other grievances leading associates to quickly leave firms); Paul M. Barrett, *Dreary Paper Chase Vexes Legal Rookies*, WALL ST. J., Oct. 21, 1996, at B1, col. 3 (reporting complaints of associates, including more required billable hours, lack of involvement in decision-making, competition for scarce partnership slots from laterally-hired partners from other firms); Amy Stevens, *This Breed of Rodent Is Becoming a Pest at Major Law Firms*, WALL ST. J., Aug. 20, 1993, at A1, col. 4 (reporting on scathing underground newsletter for associates at large law firms).

76. *See* GALANTER & PALAY, *supra* note 65, at 50.

77. Bates v. State Bar of Arizona, 433 U.S. 350 (1977), was, of course, the watershed decision on lawyer advertising. For a useful, recent survey of Supreme Court and lower court decisions, *see* Jason B. Lutz, Note, *Attorney Advertising and Disciplinary Action: Some Do's and Don'ts of Advertising*, 25 J. LEGAL PROF. 183 (2001). *See generally* Thomas D. Morgan, *The Impact of Antitrust Law on the Legal Profession*, 67 FORDHAM L. REV. 415 (1998) (discussing various theories of antitrust enforcement and episodes of Antitrust Division activism). Attorneys can also openly solicit clients in the District of Columbia. *See* D.C. Rules of Professional Conduct Rule 7.1(b). To a lesser extent, in-person solicitation is also permissible in Maine and North Dakota. Me. Code of Professional Responsibility, Rule 3.9(f)(1) (in-person solicitation prohibited only if it involves duress or risk of undue influence or ill-considered action by person solicited, as in solicitation of individuals either in police custody or in hospital, or with impaired mental faculties); N.D. Rules of Professional Conduct, Rule 7.1(b) (in-person solicitation prohibited only if it employs a false or misleading statement or undue influence or if the potential client apparently cannot exercise reasonable judgment or does not wish to be contacted.). On the general prohibition against in-person solicitation of clients by lawyers, *see, e.g.*, 2 GEOFFREY C. HAZARD, JR. & W. WILLIAM HODES, THE LAW OF LAWYERING ch. 57 (3d ed. 2001); Laws. Man. Prof. Conduct (ABA/BNA) 81:2001 (Apr. 22, 1992); MODERN LEGAL ETHICS, *supra* note 12, at § 14.2.5.

compete for legal business, with most large firms now spending millions of dollars on marketing efforts of a subtle or not-so-subtle nature.[78] Tradition-minded lawyers remain highly distressed by lawyer advertising, but the public is less concerned.[79] One indication of how recent is this development is that the now-familiar term "rainmaker" was not known until the 1980s.[80] Whether or not related to the increased commercialization of law practice itself, client loyalty to law firms seems to have eroded substantially, with most large corporations no longer concentrating most of their legal work in one law firm. In addition, most large corporations now have large in-house legal counsel staffs.

Changes of such magnitude would create enormous stress within any hitherto stable occupational group. And great stress surely has afflicted the American legal profession. Doubling the size of the membership in the legal profession in a few decades would alone portend very substantial weakening of existing professional ideology and organization. The strength and influence of the organized national bar with respect to the major objectives of the legal profession has thus decreased. Elite lawyers are increasingly too busy billing hours and administering their enormous law-firm organizations as well as too widely scattered into increasingly isolated niches of highly specialized law practice to devote much attention to the bar's general agenda. One now hears more blathering and less hard-edged rhetoric from the organized bar. The separation between the practicing bar and the legal academy, which began shortly after the Civil War, has now grown to a seemingly unbridgeable gulf.[81] A generation of

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78. *E.g.*, Ritchenya A. Shepherd, *Beyond Brochures: More Large Firms Trying Slick Ads for Their Messages*, 84 A.B.A. J. 34 (May 1998) (describing marketing/advertising campaigns by large law firms); Peter W. Martin, *Prospecting the Internet*, 81 A.B.A. J. 52 (Sept. 1995) (describing possibilities for lawyer marketing on internet); Cynthia Cotts, *Sharp Rise in Web Sites for Largest Firms*, NAT'L. L.J., Oct. 6, 1997, at B7 (reporting survey revealing that most major law firms had established internet presences to generate business); Kemba J. Dunham, *Law Firms, in a Competitive Bid, Appoint Chief Marketing Officers*, WALL ST. J., May 15, 2001, at B12 (reporting widespread and enthusiastically embraced role of chief marketing officer in many large law firms); Margaret A. Jacobs, *Lawyers and Clients: Law Partners Go to Business School for Certain Answers*, WALL ST. J., Oct. 9, 1995, at B6, col. 1 (reporting news account of lawyers attending business school for tips on marketing, including advice that selling legal services "is not that different from marketing fast food at Taco Bell"). Marketing to potential lawyer-marketers is also now rife. *E.g.*, G. BURGESS ALLISON, THE LAWYER'S GUIDE TO THE INTERNET (1995); RAINMAKING: CLIENT DEVELOPMENT IN THE 90S, LEXIS/NEXIS (1995); William J. Winston, ed., MARKETING FOR ATTORNEYS AND LAW FIRMS (1993). *See also, e.g.*, Ariz. St. Bar Comm. on Rules of Professional Conduct, Op. No. 96-10 (1996) (opining that law firm could permissibly employ marketing director so long as activities would be permissible if performed by lawyer).

79. *See* ABA Commission on Lawyer Advertising, Lawyer Advertising at the Crossroads (1994); *see also, e.g.*, Richard B. Schmitt, *ABA Study Finds Ads by Lawyers Aren't Tarnishing Their Image*, WALL ST. J., Jan. 13, 1995, at B12 (reporting study and lawyer reaction).

80. *See* GALANTER & PALAY, *supra* note 65, at 53 n.108.

81. *See, e.g.*, Harry Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 MICH. L. REV. 34 (1992); *cf., e.g.*, Richard A. Posner, *The Deprofessionalization of Legal Teaching and Scholarship*, 91 MICH. L. REV. 1921 (1993) (noting several reactions to Judge Edwards' remarks). To much the same effect, and for additional reasons, *see* Patrick J. Schlitz, *Legal Ethics in Decline: The Elite Law Firm, the Elite Law School, and the Moral Formation of the Novice Attorney*, 82 MINN. L. REV. 705, 763-71 (1998).

legal scholars who cut their ideological teeth in the struggles in the 1960s against perceived pretensions of illegitimate centers of power now reign as the dominant intellectual voices in lawyer education. At a political extreme from such voices is the law-and-economics movement, which was virtually non-existent in most American law schools before the 1970s.[82] For our purposes, however, both ideologies converge. Both schools of thought share the radical insight that policy-based arguments by lawyers and their bar associations for self-regulatory powers and other accoutrements of the lawyer's office are highly suspect. There is now an almost total unwillingness within the legal academy to consider the organized bar as the legitimate voice for all lawyers or to accept traditional lawyer ideology as something like the established religion of law practice.

The legal profession, in such a stressed environment, was in no effective condition and stood in no effective political, moral or ideological posture to resist the rising tide of regulation by law that the past thirty years has witnessed. The confluence of that environment with the conditions for lawyer regulation that had been established for over a century, gave rise to the present state of lawyer regulation.

CONCLUSION

My approach to this point, I trust, has been at least mildly historical. Thus far, I have intended to offer no personal judgment about whether the vastly-increased legalization of the legal profession in the United States is a net plus, or otherwise–no more than I have attempted to make such a judgment about the sweep of law and regulation in the modern regulatory state in general. I wish to conclude with such an overall, explicit appraisal of lawyer regulation. There are certainly reasons to be concerned about some aspects of lawyer regulation, separate and apart from reasons that may stem from a politically conservative or libertarian set of instincts or from principles that are otherwise anti-government in general and not related to economic self-interest. The legal profession may present a special case for increased regulation, even from a much more liberal standpoint.

Lawyers may uniquely serve an important role in the political and social order–that of assuring that the engines of both government and self-government work well. At its most dramatic perhaps, that role may require the defense of those accused of crime, including those accused of heinous crimes against the state. The spectacle of a lawyer from private practice being permitted to cross-examine a high-ranking government officer in a prosecution of the lawyer's client for what, if established, would be the most state-threatening offense, such as stealing secrets to pass to an enemy of the state, tells us much that is right, if

82. At least one indisputable milestone was the publication in 1973 of Professor, now Judge, Richard A. Posner's book, *Economic Analysis of Law*.

perhaps not particularly comforting, about the state of liberty in such a polity.[83] It is perhaps not too much to say that any state in which such a defense may not occur is a state that is not yet authentically democratic. A threat posed by the regulatory state, of course, is that such advocacy will be modulated or silenced entirely in some important areas, including both civil and criminal proceedings.

That the regulatory state has, to some extent, been kept from intruding into every detail of every person's life is itself, in part, a tribute to a vibrant legal profession, particularly judges and bar associations. The role of judges, and to a lesser extent bar associations, in protecting the prerogatives of lawyers has also, at least on occasion, been liberating for all citizens, including some of the most oppressed. A good example is the occasional role of bar associations and the pivotal role of federal courts in protecting lawyers who, participating in the Civil Rights Movement, acted against attempts in several Southern states to restrict efforts on behalf of organizations such as the National Association for the Advancement of Colored People.[84]

Moreover, it is hardly the case that legalization of the legal profession has been uniformly oppressive. A considerable amount of regulation has also resulted in liberalization. Two examples that might immediately come to one's historical gaze over the years since 1970 are lawyer advertising and fee schedules. Lawyer advertising at one time was by far the most heavily regulated aspect of lawyers' professional lives, primarily through an "ethics" regime that was run almost entirely out of bar associations and was fixated on restricting lawyer competition by suppressing advertising.[85] This of course has now been largely, but not entirely, displaced or neutralized.[86] A restriction on lawyer activity that certainly never loomed as large was the constriction of price or fee competition imposed by so-called minimum fee schedules, which at least some bar associations tried to enforce generally against lawyers. These schedules, however, have entirely disappeared following a 1975 decision of the U.S. Supreme Court applying

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83. I refer, of course, to the contemporary situation of the defense of Dr. Wen Ho Lee, late of the top-secret Los Alamos National Laboratory, who was initially charged in a multi-count indictment with stealing computerized atomic secrets to pass on to the People's Republic of China. He was ultimately all but exonerated and released, with the presiding federal judge giving the executive branch a tongue-lashing over what he perceived to be overly aggressive governmental use of the criminal process against Dr. Wen Ho Lee. James Steingold, *Nuclear Scientist Set Free After Plea in Secrets Case: Judge Attacks U.S. Conduct*, N.Y. TIMES, Sept. 14, 2000, at A1. For retrospectives, *see,* David E. Rovella, *Defeating Goliath: How Wen Ho Lee's Lawyers Took the DOJ to the Woodshed*, NAT'L L.J., Oct. 9, 2000, at A1. One may more recently add examples of lawyers functioning as defense counsel for alleged international terrorists.

84. *See* National Ass'n for Advancement of Colored People v. Button, 371 U.S. 415 (1963) (holding that Virginia could not constitutionally apply to advocacy organization broadly-phrased statutes outlawing solicitation of legal business); *see generally* MODERN LEGAL ETHICS, *supra* note 12, at § 8.8.3.

85. *E.g.*, MODERN LEGAL ETHICS, *supra* note 12, at § 14.2.2 (detailing high degree of disciplinary attention to lawyer advertising); id. at 65 (over half of bar ethics opinions (as of 1968) were devoted to advertising-solicitation issues).

86. See *supra* text at note 76-81.

federal antitrust law to such blatant price-setting activities.[87]

Lawyers have also been able to turn to the law for their own self-interests. Although it must have embarrassed at least some bar leaders and judges–who have long protested that only courts can regulate lawyers–a concerted campaign of lawyer and bar association lobbying in state legislatures a decade ago resulted in the addition of many initials to the end of law firms' names. The aim was to take advantage of limited-liability partnership statutes and other new legislation protecting lawyers against personal liability for legal malpractice and protecting law firms from liability under the theory of respondeat superior.[88]

To offer my own global and impressionistic view of the world, I think the case cannot be made that lawyers are presently "over-regulated" in the United States, whether the point of comparison is non-lawyers within the same system or some idealized model of a free life as a professional in a good society. I do not, to be sure, claim that lawyers are themselves ideally regulated by the law–far from it. I have devoted some years to arguing about ways in which lawyers should be better regulated. Clearly, the opposite case that lawyers are in some strong sense immune from effective regulation is no longer seriously considered. My own assessment is that American lawyers are thoroughly subject to the regulatory state about as much as sound public policy warrants.

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87. Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975). It would have been possible, as a doctrinal matter, to perpetuate fee schedules under the cover of the "state action doctrine," which operates, in effect, as a common-law exception to the federal antitrust laws (*see generally* MODERN LEGAL ETHICS, *supra* note 12, at § 2.4.2). However, that doctrine requires that the fee schedule be promulgated and enforced (more or less directly) by an organ of state government, in most states the jurisdiction's highest court. Because state court judges are far more sensitive to the economic concerns of clients than are bar association leaders, no state has moved to perpetuate minimum fee schedules through a state-action-protected governmental apparatus.

88. *See generally* Charles W. Wolfram, *Inherent Powers in the Crucible of Lawyer Self-Protection: Reflections on the LLP Reform Legislation*, 39 S. TEX. L. REV. 359 (1998).